No. 80-1480

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In the Supreme Court of the United States

OCTOBER TERM, 1980

RICHARD ROWE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AND THE SECRETARY OF THE INTERIOR IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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1. On September 23, 1966, the Department of the Interior published in the Federal Register (31 Fed. Reg. 12575-12576; Pet. App. 99-105) a notice that certain lands in the State of Alaska were available for noncompetitive oil and gas leasing pursuant to the Mineral Leasing Act of Feb. 25, 1920 (30 U.S.C. 181 *et seq.*) and implementing regulations (43 C.F.R. Part 3120). Persons interested in leasing the lands were invited to submit offers to be accompanied by a check for the first year's advance rental. The successful offerors would be determined by a drawing. "Upon the determination of the successful drawee * * *, the first year's rental will be earned and deposited in the U.S. Treasury, and will not be returnable" (Pet. App. 103).

Groups of Alaskan natives protested this proposed disposition of resources in lands that they viewed as rightfully theirs. In response to these protests, on December 8, 1966,

the Department of the Interior published in the Federal Register a notice that the drawings would proceed as previously announced but that "issuance of oil and gas leases pursuant to offers filed * * * will be suspended pending further consideration of protests which have been received." 31 Fed. Reg. 15494.[1] Pursuant to Department regulation (43 C.F.R. 3123.5(b) (1966), recodified as 43 C.F.R. 3111.1-1(c) (1979)), the acceptance of a lease offer and issuance of the lease by the United States were to be indicated "by the signature of the appropriate officer thereof in the space provided [on the lease form]."

The drawing was held on December 20, 1966, and petitioners were among those whose offers were drawn. The first year's rentals accompanying their offers were deposited in the Treasury of the United States, but, in accordance with the December 8 notice published in the Federal Register, no leases were issued to them. In line with the requests of many of the applicants that their offers not be rejected until the protests had been resolved, the Department suspended further action and retained the first year's advance rentals (Pet. App. 64 n.64, 81, 87).

On January 17, 1969, the Secretary of the Interior issued Public Land Order 4582, which withdrew all public lands in Alaska from mineral leasing "for the determination and protection of the rights of the native Aleuts, Eskimos, and Indians of Alaska." 34 Fed. Reg. 1025.[2]

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[1]Public notices were also issued by the Land Offices in Anchorage and Fairbanks to the effect that any issuance of the leases would be postponed indefinitely following the drawing and that the first year's rental of the successful drawee would not be returnable (Pet. App. 20-21). Approximately 30% of the 1131 acceptable offers that had been submitted were withdrawn prior to the drawing, including those of several of the plaintiffs in this action (Pet. App. 21-22, 58 n.40).

[2]The duration of this withdrawal was subsequently extended by further withdrawals. See, *e.g.*, Public Land Order 4962, 35 Fed. Reg. 18874 (1970); Public Land Order 5081, 36 Fed. Reg. 12017 (1971).

In December 1971, Congress enacted the Alaska Native Claims Settlement Act, which, among other things, authorized the conveyance to Native Regional Corporations of the subsurface estate in lands selected by them. 43 U.S.C. 1613(f). Parts of the lands for which petitioners had been the successful drawees were selected by the Arctic Slope Regional Corporation, and on August 31 and September 17, 1976, an interim conveyance of these lands to the Corporation pursuant to 43 U.S.C. 1613(e) was approved by the Bureau of Land Management. 41 Fed. Reg. 36672; 41 Fed. Reg. 40193.

2. Contending that the drawing of their lease applications had vested in them certain rights in the lands covered by those applications, petitioners pursued an appeal within the Department of the Interior from the decision of the Bureau of Land Management to convey some of those lands to the Arctic Slope Regional Corporation. On November 24, 1976, the Acting Secretary of the Interior held that the drawing of petitioners' lease offers did not confer upon them any interest in the lands covered by the offers, and that the Secretary, having decided not to lease such lands at all, was under no duty to issue a lease to the petitioners (Pet. App. 85-89). The decision also directed that a refund be made of the advance rentals that accompanied the applications (*id.* at 97). To date, petitioners have refused to accept the tendered refunds.

On December 28, 1976, petitioners filed suit in the United States District Court for the District of Alaska, seeking the issuance to them of the oil and gas leases for which they applied and damages in excess of $10,000 for the failure to issue those leases. On cross-motions for summary judgment, the district court upheld the decision of the Secretary of the Interior and dismissed the entire case on the merits

(Pet. App. 12-76).[3] In particular, the court concluded "that the statutory mandate of the Mineral Act is not impeded, and indeed is buttressed by the retention of discretion to lease until the moment at which leasing occurs through execution" (464 F. Supp. at 1080).

On petitioners' appeal, the court of appeals affirmed in pertinent part (Pet. App. 1-11). Finding that the district court had jurisdiction over petitioners' claim for the issuance of mineral leases,[4] the court of appeals "agree[d] with the district court that [petitioners] failed to establish any right to the leases they sought, by contract, statute, or otherwise," and accordingly it "affirm[ed] the grant of summary judgment for [respondents] on this issue for the reasons stated in the district court's opinion" (*id.* at 9).

3. The courts below correctly upheld the Secretary's decision in this case on the basis of two well-settled principles under the Mineral Leasing Act. First, while the Act directs that the first qualified applicant is entitled to any noncompetitive oil and gas lease that is issued, it leaves "the Secretary [of the Interior] discretion to refuse to issue any lease at all on a given tract." *Udall* v. *Tallman*, 380 U.S. 1, 4 (1965). See also, *e.g.*, *Schraier* v. *Hickel*, 419 F. 2d 663, 666 & n.7 (D.C. Cir. 1969). Second, "[t]he filing of an application which has not been accepted does not give any right to a lease, or generate a legal interest which

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[3]The district court's decision, as reprinted in the petitioners' appendix, lacks the last three paragraphs. The decision is reported in full at 464 F. Supp. 1060 (1979).

[4]The court of appeals also concluded that petitioners' claim for damages in excess of $10,000 was within the exclusive jurisdiction of the Court of Claims, and therefore that the district court should have either dismissed this claim for lack of jurisdiction or transferred it to the Court of Claims (Pet. App. 8). On February 27, 1981, petitioners filed in the district court a "Motion to Transfer Claims for Damages to the Court of Claims."

reduces or restricts the discretion vested in the Secretary whether or not to issue leases for the lands involved." *Duesing* v. *Udall*, 350 F. 2d 748, 750-751 (D.C. Cir. 1965), cert. denied, 383 U.S. 912 (1966). See also, *e.g.*, *Burglin* v. *Morton*, 527 F. 2d 486, 488 (9th Cir. 1975), cert. denied, 425 U.S. 973 (1976). In light of these established principles, it is evident that the Secretary has discretion to decide not to lease the lands at issue here and that the filing of oil and gas lease offers for the lands in no way limits the Secretary in the exercise of his discretion or gives petitioners any rights in those lands.

Petitioners attempt to avoid these principles by contending that under the "rules of contract law that are applied to transactions between private parties," the Secretary's deposit in the Treasury of their first year rentals, and the subsequent failure to return the money to them, constituted an acceptance of their lease offer (Pet. 13, 15). However, "[t]he essence of an agreement is mutual assent and in a court of law the existence of assent can only be reconstructed through evidence of words or deeds which objectively manifest the expression of assent." *Hodgson* v. *First Fed. Sav. & L. Ass'n of Broward Co., Fla.*, 455 F. 2d 818, 824 (5th Cir. 1972). Here, it is clear that petitioners' offers were never accepted.

First, as the district court found, the administrative scheme "clearly contemplated that during the period following the drawing * * * the [Department] could reject a lease offer and be required to refund the advance rental * * *" (Pet. App. 46). This understanding was reinforced by the public notices that issuance of the leases following the drawing would be suspended pending further consideration of protests filed with the Department (see page 2, *supra*). And "[n]owhere in the notice [inviting lease offers] is there mention that the non-returnability provision altered the Secretary's traditional discretion over whether or not to

lease" (Pet. App. 44). Consequently, even before the drawing, petitioners knew not only that their first year's rentals would be deposited in the Treasury if their offers were drawn, but also that the deposit of their money would have no bearing on whether leases would ever issue as a result of the drawing.

Second, the Department's "regulations, in force at the time, explicitly stated that acceptance of a lease offer would be indicated by the exclusive method of the Secretary's signature on the lease form" (Pet. App. 47). Thus, "acceptance of a simultaneous lease offer could not have been indicated in any manner other than by a signature of the appropriate officer on the lease form" (*ibid.*). Since the Department did not endorse the lease form, petitioners' offers were never accepted.

Accordingly, the district court correctly concluded that "[t]here is no support anywhere for [petitioners'] theory that * * * the [leasing] notice was somehow * * * intended to alter the established policy and requirements of law * * * that lease acceptance remain within the full discretion of the Secretary up until a designated government official had executed leases in favor of priority-holding applicants" (Pet. App. 45). Nor is a different result suggested by *Superior Oil Co.* v. *Udall*, 409 F. 2d 1115 (D.C. Cir. 1969), upon which petitioners heavily rely, for that case involved only the question of which of two competing offerors was entitled to an oil and gas lease that the Secretary had decided to issue. Nothing in *Superior Oil* bears on the

Secretary's discretion, as in this case, to refrain from issuance of a lease at all. Cf. *Arnold* v. *Morton*, 529 F. 2d 1101, 1106 n.10 (9th Cir. 1976).[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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[5]We also note that the precedential effect of *Superior Oil* may be in question in light of the fact that the case was ultimately remanded to the district court with instructions to dismiss it as moot. *Superior Oil Co.* v. *Hickel*, 421 F. 2d 1089 (D.C. Cir. 1969). See, *e.g.*, *Great Western Sugar Co.* v. *Nelson*, 442 U.S. 92 (1979); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950).